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I. Introduction

At the general election on November 6, 1984, "the people" of Pennsylvania twice amended the state constitution. Pennsylvanians have now altered that document seventeen times since 1968, when it became effective as the state's fifth fundamental charter of government.[1] The two most recent changes illustrate the wide range of state governmental activity subject to the frequently invoked amendment process. One of the changes concerns local taxing authority,[2] the most typical kind of state constitutional reform.[3] The other touches a more controversial topic. By voting to allow the use of otherwise suppressed voluntary confessions to impeach the credibility of criminal defendants on the witness stand, the people of Pennsylvania have decided to narrow significantly the privilege against self-incrimination under article I, section 9 of the state constitution,[4] as construed by the state's highest court.[5] Opponents of the amendment

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1. COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 1984-1985 221 (1984) [hereinafter cited as BOOK OF THE STATES]. The Constitutional Convention of 1967-1968 did not create an entirely new document, as the conventions of 1776, 1790, 1838 and 1873 did. The people had approved only a limited convention, with authority to make revisions in four general areas: legislative apportionment; judicial administration, organization, selection and tenure; local government; and taxation and state finance. PREPARATORY COMM. OF THE PA. CONST'L CONVENTION, THE CONVENTION 15 (1967).

2. H.R.J. Res. 2, 1982 Pa. Laws 1478.

3. Of the 149 state constitutional amendments adopted during the 1982-1983 biennium, one-third involved taxation and finance matters. In all, 74 of these proposals appeared on the ballots. BOOK OF THE STATES, *supra* note 1, at 214-16.

4. Article I, section 9, as amended, provides:

> In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. *The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself.*

S.J. Res. 2, 168th Reg. Sess., 1984 Pa. Legis. Serv. No. 6, A-1 (Purdon) (emphasis in original).

5. In Commonwealth v. Triplett, 464 Pa. 244, 341 A.2d 62 (1975), the Supreme

argue that specific application of broad constitutional principles, particularly in the area of individual rights, is best left to the judiciary. They fear that, in the words of one Pennsylvania legislative analyst, "this is only the first skirmish in an all-out war on the rights of accused persons."[6]

Article I of the Pennsylvania Constitution, however, also declares that all power "is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness." Therefore, "the people" have "at all times an inalienable and indefeasible right to alter, reform or abolish their government in such a manner as they may think proper."[7] Undoubtedly, the adoption of the voluntary confession amendment was a permissible exercise of the people's sovereign power. But even so, it raises problems touching the often uneasy balance of power upon which the American constitutional system depends. The most critical issue concerns the conflicting purposes of the state constitution in a representative democracy.[8] On the one hand, the constitution should preserve inviolate those individual rights which have become, in the evolution of Anglo-American law, the cornerstones of a free society;[9] on the other, the state constitution in particular should reflect, to the greatest extent possible, the popular will.[10]

This comment examines the background and effect of the voluntary confession amendment, with particular emphasis on the emergence of state constitutional jurisprudence. It analyzes the amendment in light of recent political trends and in terms of basic legal and political theory. It concludes that although the general assembly and the electorate acted legally, the assembly nonetheless committed a political indiscretion by invoking the majoritarian amendment pro-

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Court of Pennsylvania held that tainted voluntary confessions are inadmissible for impeachment purposes. *See infra* notes 21-25 and accompanying text.

6. Pa. L.J. Rep., Nov. 19, 1984, at 2, col. 3.

7. PA. CONST. art. I, § 2.

8. *See infra* notes 53-59 and accompanying text.

9. "We think it fundamental in our theory of constitutional government that the basic purpose of a written constitution has a two-fold aspect, first, the securing to the people of certain unchangeable rights and remedies, and, second, the curtailment of unrestricted governmental activity within certain defined fields." DuPont v. DuPont, 32 Del. Ch. 413, 85 A.2d 724, 728 (1951). *See also* Hurtado v. California, 110 U.S. 516, 533 (1883) (written constitutions essential to preservation of fundamental rights).

10. "[A constitution] is not the beginning of a community, nor the origin of private rights; it is not the fountain of the law, nor the incipient state of government; it is not the cause, but consequence, of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience." T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 37 (reprint ed. 1972) (quoting Hamilton v. St. Louis County Ct., 15 Mo. 5, 13 (1851)). The populist view of state constitutions stems largely from "early twentieth century progressivism." Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43, 47 (1983); *see generally* W. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS (1910) (progressive era legal scholar urging use of amendment process as means of popular control of government).

cess in this case.

II. The Background

A. Suppressed Confessions Under the Fifth Amendment: Harris v. New York

In 1971, a closely divided United States Supreme Court held, in *Harris v. New York*,[11] that a prosecutor can impeach the credibility of a defendant on the witness stand by using statements acquired in violation of the defendant's privilege against self-incrimination. Many observers, including three of the four dissenting Justices, considered *Harris* a substantial retreat from the Court's earlier construction of the fifth amendment in *Miranda v. Arizona*.[12] Harris had given an apparently voluntary confession following his arrest, but the police had failed to inform him of his right to counsel as required under *Miranda*. When he later took the stand on his own behalf, some of his testimony contradicted his post-arrest confession. The trial judge allowed the state to introduce evidence of the confession for impeachment purposes. Writing for the majority, Chief Justice Burger acknowledged that the state could not use tainted evidence during its case-in-chief, but concluded that "the shield provided by *Miranda* cannot be perverted into a license to commit perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."[13] An overwhelming majority of state courts have applied the *Harris* rationale without considering the possibility of separate state constitutional analysis.[14]

B. The Independence of Pennsylvania Constitutional Jurisprudence: Triplett and Beyond

1. The Triplett Case.—Until recently, Pennsylvania was among the minority of states that rejected *Harris*.[15] In *Commonwealth v. Triplett*,[16] the Supreme Court of Pennsylvania held that

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11. 401 U.S. 222 (1971).

12. 384 U.S. 436 (1966). In his *Harris* dissent, Justice Brennan claimed that the majority had undermined the two great objectives of the privilege against self-incrimination, as construed in *Miranda*: (1) "safeguarding the integrity of our judicial system;" and (2) "deterring improper police conduct." *Harris*, 401 U.S. at 231-32 (Brennan, J., dissenting).

13. *Harris*, 401 U.S. at 226.

14. *See, e.g.*, Hall v. State, 292 Md. 683, 441 A.2d 708 (1982); People v. Wise, 46 N.Y.2d 321, 385 N.E.2d 1262, 413 N.Y.S.2d 334 (1978); State v. Johnson, 109 Ariz. 70, 505 P.2d 241 (1973); People v. Moore, 54 Ill. 2d 33, 294 N.E.2d 297 (1973); Johnson v. State, 258 Ind. 683, 284 N.E.2d 517 (1972); State v. Falco, 60 N.J. 570, 292 A.2d 13 (1972); State v. Kassow, 28 Ohio St. 2d 141, 277 N.E.2d 435 (1971).

15. *See, e.g.*, People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976); State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971); Butler v. State, 493 S.W.2d 190 (Tex. Crim. App. 1973) (relying on statutory rule).

16. 462 Pa. 244, 341 A.2d 62 (1975).

under article I, section 9 of the state constitution,[17] which substantially mirrors the language of the fifth amendment,[18] tainted voluntary confessions are inadmissible even for impeachment purposes. The court offered scant reasoning for its decision, noting only that a defendant should not have to make the "grisly Hobson's choice" between his right to testify on his own behalf and his right not to have illegally obtained statements used against him.[19] Two Justices dissented, but only one, Chief Justice Jones, argued that the *Harris* rationale should apply in Pennsylvania.[20]

2. Emergence of Pennsylvania Constitutional Jurisprudence.—The *Triplett* case was the harbinger of a trend in Pennsylvania constitutional law decisions. On numerous occasions over the past ten years, Pennsylvania courts have held that the state constitution provides greater protection of individual rights than the United State Supreme Court has recognized under the federal constitution.[21] Confronted with Burger Court decisions that have narrowed and restricted earlier interpretations of the Bill of Rights, state courts have increasingly recognized the independence of state constitutions within the federal system.[22] Accordingly, an entire body of

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17. *See supra* note 4.

18. The fifth amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

19. *Triplett*, 462 Pa. at 249, 341 A.2d at 64 (quoting Commonwealth v. Woods, 455 Pa. 1, 7, 312 A.2d 357, 360 (1973) (Roberts, J., concurring)).

20. Chief Justice Jones expressed the further view that the *Harris* rationale should apply to involuntary confessions as well as voluntary ones. The defendant would then have the opportunity on re-direct examination to rehabilitate himself by showing the circumstances under which the confession was obtained. *Id.* at 256, 341 A.2d at 68 (Jones, C.J., dissenting).

21. Commonwealth v. Turner, 499 Pa. 579, 454 A.2d 537 (1982) presents another self-incrimination case. The *Turner* court held that article I, § 9 of the Pennsylvania Constitution does not allow the Commonwealth to impeach a defendant with the fact that he remained silent after his arrest. The ruling expressly rejected the contrary decision of the United States Supreme Court in Fletcher v. Weir, 455 U.S. 603 (1982). *See also* Commonwealth v. Tate, 495 Pa. 158, 432 A.2d 1382 (1981) (free speech); Commonwealth v. Bussey, 486 Pa. 221, 404 A.2d 1309 (1979) (waiver of Miranda rights); Commonwealth v. DeJohn, 486 Pa. 32, 403 A.2d 1283 (1979), *cert. denied*, 444 U.S. 1032 (1980) (search and seizure of bank records); Commonwealth v. Richman, 458 Pa. 167, 320 A.2d 351 (1974) (right to counsel at pre-indictment line-up); Commonwealth v. Campana, 452 Pa. 233, 304 A.2d 432 (1973) (double jeopardy).

22. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (Justice Brennan notes "a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being," active enforcement of individual rights). "We have not hesitated when we concluded that the Federal Constitution as interpreted by the Supreme Court fell short of adequate protection for our citizens to rely upon the principle that that document defines the minimum level of individual rights and leaves the states free to provide greater rights for its citizens through its Constitution, statutes or rule-making authority." Cooper v. Morin, 49 N.Y.2d 69, 79, 399 N.E.2d

state constitutional jurisprudence has evolved over the past decade, with an emphasis on criminal procedure.[23] Pennsylvania has taken significant part in this development.

Since *Triplett*, Pennsylvania decisions have become more sophisticated in their interpretation of the state charter. For example, in *Commonwealth v. Sell*,[24] the Pennsylvania Supreme Court rejected the United States Supreme Court's reasoning in *United States v. Salvucci*[25] and held that a defendant has "automatic standing" to challenge, as a violation of the prohibition against unreasonable search and seizure, the admissibility of evidence in which the defendant had an ownership or possessory interest.

Sell presents a truly independent Pennsylvania approach to constitutional analysis.[26] The majority, relied heavily on Pennsylvania history and precedent to construe the search and seizure provisions of the Pennsylvania constitution. It noted that the "constitutional protection against unreasonable searches and seizures existed in Pennsylvania more than a decade before the adoption of the federal Constitution, and fifteen years prior to the promulgation of the Fourth Amendment."[27]

The Superior Court of Pennsylvania recently applied a similar analysis to the same constitutional provision in *Commonwealth v.*

1188, 1193, 424 N.Y.S.2d 168, 174 (1979), *cert. denied*, 446 U.S. 984 (1980). *See also* People v. Rucker, 26 Cal. 3d 368, 605 P.2d 843, 162 Cal. Rptr. 13 (1980) ("privilege against self-incrimination in the California Constitution is at least as broad, and often broader, than that accorded by the federal Constitution"); State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982) (search and seizure); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973) (equal protection right to education).

23. Wilkes, *The New Federalism in Criminal Procedure Revisited*, 64 KY. L.J. 729 (1976). The field of state constitutional jurisprudence has inspired an avalanche of mostly insightful commentary. *See, e.g.*, Brennan, *supra* note 22; Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981); Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454 (1970); Douglas, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123 (1978); Falk, *Forward—The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); Fischer, *supra* note 11; Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U.L. REV. 125 (1969); Galie & Galie, *State Constitutional Guarantees and Supreme Court Review: Justice Marshall's Proposal in* Oregon v. Hass, 82 DICK. L. REV. 273 (1978); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 299 (1978); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974).

24. 504 Pa. 46, 470 A.2d 457 (1983).

25. 448 U.S. 83 (1980).

26. Ledewitz, *Pennsylvania Law: The State Constitution Assumes New Importance*, Pa. L.J.-Rep., Nov. 5, 1984, at 1, col. 1.

27. *Sell*, 504 Pa. at 63, 470 A.2d at 466. Chief Justice Nix noted the similarity of language between the current state search and seizure provision and the one embodied in Pennsylvania's first constitution. He concluded that "the survival of the language now employed in Article I, section 8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth." *Id.* at 65, 470 A.2d at 467.

Beauford.[28] The court concluded that police use of a pen register, a device that records the numbers dialed from a telephone unit without intercepting any conversation, violates the state prohibition against unreasonable searches and seizures. The *Beauford* decision expressly contravenes *Smith v. Maryland*,[29] in which the United States Supreme Court held that the use of pen registers does not violate the fourth amendment. By a unanimous panel, the court incorporated Pennsylvania constitutional history, case precedent, statutory provisions and legislative history into its exposition of article I, section 8. Thus, unlike the *Triplett* court, the *Beauford* court did more than merely reject the Supreme Court's reasoning in favor of its own. It went on to conclude that its "constitutional interpretation derives independent support from Pennsylvania's long history of affording special protection to the privacy interest inherent in a telephone call."[30] Both *Sell* and *Beauford* illustrate the many recent cases in which Pennsylvania courts have sought to develop and explain the foundations of Pennsylvania constitutional law.[31]

Sell further demonstrates that although Pennsylvania courts in the past have adhered to federal precedent on a particular matter of constitutional interpretation, they need not continue to do so. For twenty years, Pennsylvania followed the lead of the United States Supreme Court in *United States v. Jones*[32] on the issue of automatic standing. When the Supreme Court effectively overruled *Jones* in its *Salvucci* decision, the *Sell* court chose to remain with *Jones*. After a long discussion of federal precedent, the Pennsylvania Supreme Court concluded that *Jones* more accurately reflected the Pennsylvania view of automatic standing in search and seizure cases.[33]

C. *The Legislature Reacts: Debates in the Senate*

When the public believes that defendants accused of heinous activity have slipped through constitutional loopholes to escape appropriate sanctions, attacks on the judiciary and the exclusionary rule resound from all corners.[34] Thus, in 1981, Senator Stewart Greenleaf,[35] with the close cooperation of Philadelphia District Attorney

28. 327 Pa. Super. 253, 475 A.2d 783 (1984) (panel).
29. 442 U.S. 735 (1979).
30. *Beauford*, 327 Pa. Super. at 267, 475 A.2d at 790.
31. *See supra* note 21; Ledewitz, *supra* note 26.
32. 362 U.S. 257 (1960).
33. The Pennsylvania Supreme Court has relied more than once on overruled federal decisions to bolster its own state constitutional analysis. *See, e.g.*, Commonwealth v. Henderson, 496 Pa. 349, 437 A.2d 387 (1981) (upholding "interested adult" rule in juvenile cases despite its elimination in Fare v. Michael C., 442 U.S. 707 (1979)).
34. *See, e.g.*, Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 HASTINGS L.J. 1065 (1982) (noting popular opposition to exclusionary rule); Mathias, *The Exclusionary Rule Revisited*, 28 LOY. L. REV. 1 (1982) (discussing proposals in Congress to eliminate rule).
35. The Senator is a two-term Republican from Montgomery County. He is also chair-

Ed Rendell, proposed to the Pennsylvania General Assembly a constitutional amendment designed to overrule the *Triplett* decision and align Pennsylvania with the *Harris* majority.[36]

1. The Amendment Procedure.—Article XI of the Pennsylvania Constitution requires that a proposed amendment pass two consecutive sessions of the General Assembly before the assembly can submit it to the electorate for ratification.[37] The constitution also mandates extensive publication of the proposed amendment after each passage.[38] Designed to stimulate debate and reflection, the publication requirement nevertheless drew scant public attention to the voluntary confession amendment. The proposal easily passed the sessions of 1982 and 1984,[39] despite opposition by the American Civil Liberties Union, the Philadelphia Bar Association and many members of the criminal defense bar,[40] and despite vigorous debates on the floor of the Senate.[41]

2. The Debates.—Supporters in the Senate naturally characterized the voluntary confession amendment as an anti-crime measure, intended to keep dangerous criminals off the streets and to prohibit "legalized perjury" in Pennsylvania courts.[42] Illustrating the "need" for the amendment, Senator Greenleaf described a case in which the jury acquitted a defendant charged with the rape of a fourteen-year-old girl.[43] According to the Senator, the defendant had previously confessed to the crime, but, because of an absence of procedural safeguards, the court suppressed his statement. When the defendant denied his guilt on the witness stand, the court, following *Triplett*, did not allow the prosecutor to use the suppressed confes-

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man of the Senate Committee on Law and Justice.

36. 1981 PA. SENATE LEGIS. J. 790 (remarks of Sen. Greenleaf); 1983 PA. SENATE LEGIS. J. 196-97 (remarks of Sen. Greenleaf).

37. PA. CONST. art. XI, § 1.

38. If the amendment proposal passes the first assembly, the Secretary of the Commonwealth must have it published three months before the next general election in at least two newspapers in each county. The same publication rule applies if the amendment passes the next assembly. *Id.* The constitution also provides for an expedited amendment procedure "in the event a major emergency threatens or is about to threaten the Commonwealth." *Id.* § 1(a).

39. During the 1983-84 session, the proposal passed in the Senate by a vote of 35 to 10, 1983 PA. SENATE LEGIS. J. at 202, and in the House 193 to 2, 1984 PA. HOUSE LEGIS. J. 1777-78. During the 1981-82 session, it passed in the Senate 35 to 12, 1981 PA. SENATE LEGIS. J. 792, and in the House 191 to 6, 1982 PA. HOUSE LEGIS. J. 116.

40. *See* Pa. L.J.-Rep., Nov. 19, 1984, at 2, col. 3; Pa. L.J.-Rep., July 16, 1984, at 10, col. 3. According to Senator Greenleaf, the proposal had the support of the Pennsylvania District Attorneys Association, the Philadelphia District Attorney's office and the Philadelphia Chiefs of Police Association. 1983 PA. SENATE LEGIS. J. 197 (remarks of Sen. Greenleaf).

41. *See* 1983 PA. SENATE LEGIS. J. 193-202. Senator Zemprelli noted, "It has been a long time since I have been privileged to hear the quality of debate that has taken place on this very important issue." *Id.* at 197.

42. 1983 PA. SENATE LEGIS. J. 194-96 (remarks of Sen. Greenleaf).

43. *Id.* at 194.

sion for impeachment. Proponents of the amendment argued that the court's interpretation of article I, section 9 of the constitution failed to protect the people. Therefore, they looked to the General Assembly to conform the law to the popular will.[44]

Senators who opposed the proposal expressed concern at the use of the amendment process to alter fundamental liberties. Some argued that "the Constitution of Pennsylvania and the Constitution of the United States are supposed to be basic documents which have broad statements of principles of law and are the foundations of our governments."[45] Therefore, legislative bodies threaten the constitutional system when they seek to tinker with the constitution "every time they disagree with the interpretation of the Supreme Court."[46] Senator Williams added that the guarantees of the state Declaration of Rights and the federal Bill of Rights protect minority groups against the majoritarian processes of government.[47] Other opponents argued that the amendment amounted to nothing more than a political overreaction and that the general assembly was merely attempting to lay the blame upon the judiciary for its own deficiencies in the law enforcement area.[48] In their view, by failing to recognize the importance of the rights at stake and the role of the court as interpreter of those rights, the Assembly would "throw the baby out with the bath water."[49]

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44. When the proposed amendment came up for final consideration, Senator Bell noted:

> I do not think the Constitution is sacred like the Holy Bible. I think it is a living document and, for it to remain a living document, it must be flexible. When the people are so incensed by actions of our Court, their only recourse is to the legislative Body whether it is State or National and to cast the mote out of the eye. . . . I am convinced that those judges are still humans and humans err. Therefore, the only recourse the offended people have against court decisions is through the legislative process, through the amendments. Therefore, I say if this matter offends the people of Pennsylvania, take the constitutional amendment process.

Id. (remarks of Sen. Bell).

45. *Id.* at 193-94 (remarks of Sen. Scanlon).

46. *Id.* Senator Scanlon also argued that personal or emotional disagreement with court decisions does not constitute a valid reason for amending a constitution. He noted, as examples, recent attempts to amend the United States Constitution to forbid abortion and to allow school prayer. *Id.* at 193.

47. "I do not want any of you people speaking for the [minority] to send one innocent person to jail just to satisfy a political point." *Id.* at 199 (Remarks of Senator Williams).

48. Senator Williams, in particular, urged that the assembly and the United States Congress assume more responsibility for the conduct of law enforcement activity and the effective administration of the criminal justice system. He suggested that the legislatures demand an accounting from the district attorneys, police and judges to whom they allocated funds. *Id.* at 199.

49. *Id.* at 198 (remarks of Sen. Zemprelli). On the role of the courts, Senator Williams noted:

> But I suggest to you that the etching away [of constitutional rights] because we want to take a pot shot at judges only indicates that we do not want to assume our responsibility as Legislators, and leave to [the courts] the job of interpretation of a Constitution, an extremely tough, sensitive and responsible role in our society where we have three branches of government.

In the end, the proposed amendment passed the 1984 session in time for the Assembly to submit it to the electorate on the November ballot. Unfortunately, a relatively small percentage of voters answered the two constitutional ballot questions.[50] In fact, a study conducted by Shippensburg State University revealed that only twenty percent felt they could respond intelligently to the ballot issues.[51] Nonetheless, nearly fifty-nine percent of those who did vote on the voluntary confession amendment approved of it.[52]

III. Majority Rule and Individual Rights

Unlike the United States Constitution, most state charters provide for some kind of majoritarian amendment process.[53] Pennsylvania is no exception. This leaves state constitutions open to the dangers of what James Madison called "faction."[54] In his famous defense of the federal constitution, Madison argued that "the public good is disregarded in the conflicts of rival parties, and . . . measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."[55] At the heart of American constitutional theory, then, lies the belief that an unrestrained government, even in the form of a direct democracy, is inherently at odds with the protection of basic rights.[56] The United States Supreme Court

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Id. at 196 (remarks of Sen. Williams).

50. Pennsylvania has a population of 11,863,895. BOOK OF THE STATES, *supra* note 1, at 530. In 1984, 6,193,702 Pennsylvanians were registered to vote, and 4,845,903 actually voted for one of the Presidential candidates. In sharp contrast, only 2,618,485 voted on the proposed voluntary confession amendment—less than 54 percent of the total votes cast for President and less than 22 percent of the total population. Telephone interview with records clerk, Board of Elections, Pennsylvania Department of State (Jan. 4, 1985).

51. The study was conducted before the general election. Pa. L.J.-Rep., Nov. 19, 1984, at 2, col. 2-3.

52. A total of 1,542,142 voted for the amendment, and 1,076,343 voted against it. Telephone interview with records clerk, Board of Elections, Pennsylvania Department of State (Jan. 4, 1985).

53. *See* BOOK OF THE STATES, *supra* note 1, at 223. The constitutions of New York and New Jersey establish amendment procedures substantially similar to Pennsylvania's, that is, passage by a majority of two successive legislatures and then ratification by a majority of the electorate. *See* N.Y. CONST. art. XIX, § 1; N.J. CONST. art. IX, § 1. The Constitution of Maryland, on the other hand, is less majoritarian. It requires passage by three-fifths of the legislature before submission to the electorate. MD. CONST. art. XIV, § 1. The most permissive procedures are those that provide for amendment by popular initiative. These schemes typically allow a small percentage of the electorate, rather than the legislature, to propose amendments. *See, e.g.*, OHIO CONST. art. II, § 1 (10 percent of the electorate); CALIF. CONST. art. II, § 8(b) (8 percent of the total number of votes cast in the last gubernatorial election).

54. THE FEDERALIST NO. 10, at 54 (J. Madison) (Bicentennial ed. 1976). "By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." *Id.*

55. *Id.*

56. Pure democracies "have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in

has held repeatedly that even the most discrete and insular minorities hold certain "fundamental" rights against the will of the politically dominant majority.[57] The members of the First Congress certainly had this idea in mind when they framed the federal Bill of Rights in 1790. The first ten amendments would, in Madison's words, "expressly declare the great rights of mankind" and operate "sometimes against the abuse of the executive power, sometimes against the legislative, and, in some cases, against the community itself, or, in other words, *against the majority in favor of the minority.*"[58] The theory of "great" or "basic" or "fundamental" rights, however, creates a problem at the state level: the majoritarian amendment process appears inconsistent with preservation of state constitutional guarantees.

The problem becomes particularly acute when a "hot" political issue has the potential to stir majority sentiment and fuel voter intensity. Generally, ballot propositions concerning criminal justice, race relations, and other civil liberties and civil rights fall into the "hot" political issue category.[59] Politicians can easily incorporate this type of issue into the seductive rhetoric of political campaigns. Thus, the elimination of constitutional "loopholes" or "technicalities" created by "criminal-coddling" state judiciaries becomes part of the candidate's anti-crime stance. Under these conditions, the rights of political minorities are most vulnerable.

IV. The Effect of the Current Political Climate on Criminal Justice: America's "Swing to the Right."

The United States has undergone an apparent swing to the political right in recent years.[60] At the national level, the current ad-

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general been as short in their lives as they have been violent in their deaths." *Id.* at 58. Many of the Founders profoundly feared the majoritarian excesses of most democracies, particularly in light of the bloody French Revolution. *See, e.g.*, J. ADAMS, *Letters to John Taylor of Carolina, Virginia*, in 6 WORKS 484 (C. Adams ed. 1851) (democracies, "when unchecked, produce the same effects of fraud, violence, and cruelty" as aristocracies or monarchies).

57. In the now-famous "Carolene Products footnote," Chief Justice Stone first enunciated the idea that the rights of politically powerless minorities may require a greater degree of judicial protection. *See* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

58. 1 ANNALS OF CONG. 451 (J. Gales ed. 1789) (remarks of Rep. Madison) (emphasis added).

59. *See* Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice and the First Amendment*, 29 U.C.L.A. L. REV. 505 (1982) (exhaustive study of California ballot propositions indicating that voter intensity and media attention most significant factors in determination of civil rights-related ballot issues). "State constitutional jurisprudence has met with consistent majoritarian rejection where that jurisprudence involved increased rights for criminal defendants—hardly a group for which there is much popular sympathy. Crime is an issue that usually ranks high in polls on voter concerns." Fischer, *supra* note 10, at 78.

60. *See* Stacks, *It's Rightward On*, TIME, June 1, 1981, at 12 (results of poll indicating increase in conservatism in America).

ministration has brought "law and order"to the forefront of its conservative agenda. Former Attorney General William French Smith repeatedly denounced judicial activism in the criminal procedure area and called for elimination of the exclusionary rule.[61] The appointment of conservative Supreme Court justices by Presidents Nixon, Ford and Reagan has caused the Court to edge away from the activism of the Warren era.[62] In keeping with this political climate, the High Court's decisions have increasingly deferred to police and prosecutorial activity.

The new conservatism has also affected criminal justice at the state level. Many governors and legislatures have adopted a hard line against crime, supporting increased expenditures for prison construction, district attorneys, and law enforcement.[63] In some instances, the trend has surfaced in the form of state constitutional amendments. California, for example, added a "Victim's Bill of Rights" to the state constitution in 1982.[64] The Bill established, among other things, the victim's right to restitution from the wrongdoer, the right to have all relevant evidence admitted in criminal proceedings, and the right to safe schools. It also placed restrictions on the accused's right to bail and provided for unlimited use of prior convictions for purposes of impeachment or enhancement of sentence. Also in 1982, Floridians approved an amendment that effectively eliminated the state constitutional prohibition against unreasonable searches and seizures.[65] Voters in other states, often in opposition to their state supreme courts, have approved measures to restore the death penalty, to restrict the right of bail, and to recognize the right to keep and bear arms.[66]

Although Pennsylvania's voluntary confession amendment is unique, it follows the general swing to the right in the criminal procedure area. The legislative history of the amendment proposal

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61. *See* Smith, *Is It Time to Change the Exclusionary Rule?*, L.A. Daily J., Mar. 1, 1983, at 4, col. 5. Other members of the Reagan Administration have expressed similar views. *See, e.g.*, Robinson, *Exclusion Rule High on Reagan's 'Hit List'*, Nat'l L.J., Aug. 10, 1981, at 21, col. 1 (general overview of administration policy); Brauchli, *From the Woolsack*, 12 COLO. LAW. 1098 (1983) (Presidential Counsel, now Attorney General, Edwin Meese denounces exclusionary rule).

62. *See* Gest, *A Turn to the Right by the Burger Court*, U.S. NEWS & WORLD REP., July 16, 1984, at 33; *see also* R. WOODWARD & S. ARMSTRONG, THE BRETHREN (1979) (detailed discussion of Nixon and Ford appointees and their effect on the Court).

63. *See, e.g.*, N.Y. Times, Jan. 28, 1985, at A-1, col. 6 (reporting recent budget proposals by governor of New York).

64. CAL. CONST. art. I, § 28.

65. The amendment expressly equates Florida's guarantee against unreasonable searches and seizures with the fourth amendment guarantee, as construed by the United States Supreme Court. Thus, it eliminates any independent state constitutional analysis. *See* FLA. CONST. art. I, § 12.

66. For a discussion of recent developments, see BOOK OF THE STATES, *supra* note 1, at 214-15.

reveals that its supporters intended it primarily as a means of cracking down on criminals.[67] Encouraged by the political success of the measure, the attack on procedural safeguards will most likely spread in Pennsylvania, as it has elsewhere. Senator Greenleaf, sponsor of the voluntary confession amendment, already introduced an amendment to allow the jury in a criminal case to render a verdict by only five-sixth of its members, as in civil cases.[68] In addition, Philadelphia District Attorney Rendell has proposed that the state, as well as the defendant, should have the right to request a jury trial.[69]

V. Legal Theories on the Propriety of the Voluntary Confession Amendment

Very few legal constraints upon the state constitutional amendment process exist. Generally, they derive from two sources: (1) the state constitution itself; and (2) federal law, particularly the United States Constitution.[70]

A. Procedural Limitations

Every state constitution expressly provides for its own amendment.[71] Some of them, particularly those providing for amendment by popular initiative, place detailed procedural restrictions on the process. The Ohio Constitution, for example, requires court supervision in some circumstances to ensure fairness and comprehensibility of constitutional ballot questions.[72] It also requires publication of two court-approved essays discussing the proposed amendment. While one essay will urge adoption of the proposal, the other must present opposing views.[73] Amendment procedures under other state constitutions are considerably less complicated. All, however, require strict

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67. *See supra* notes 42-44 and accompanying text.

68. S. 243, 167th Reg. Sess. (1983) (referred to Judiciary Committee, Feb. 8, 1983).

69. Pa. L.J.-Rep., Nov. 19, 1984, at 2, col. 3. To date, however, almost all of the numerous amendment proposals pending before the General Assembly concern matters outside the realm of criminal justice. Of the 84 amendment proposals under various stages of consideration in the General Assembly during the 1983-84 session, only one related directly to criminal justice. *See* PA. GEN. ASSEMBLY, 167TH & 168TH REG. SESS., COMBINED HISTORY OF SENATE AND HOUSE BILLS V-100 to V-104 (1984).

70. The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. Thus, federal constitutional constraints apply to state constitutional as well as statutory provisions. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (state constitution viewed as state statute for purposes of invoking Supreme Court jurisdiction under 28 U.S.C. § 1257(2) (1976)).

71. *See* BOOK OF THE STATES, *supra* note 1, at 223-29.

72. OHIO CONST. art. II, § 1g. The same requirements pertain to amendments proposed by the legislature. *Id.* art. XVI, § 1.

73. *Id.* art. II, § 1g.

compliance.[74]

In *Stander v. Kelley*,[75] the Supreme Court of Pennsylvania held that failure to abide by the amendment procedures of the Pennsylvania Constitution, article XI, would render an amendment void even though a majority of the electorate adopted it. For example, Article XI, Section I requires the Secretary of State to publish a proposed amendment in at least two newspapers in every city within a specified time period. Under the *Stander* rationale, if the Secretary failed to do so, the amendment would not survive an attack grounded in article XI even if adopted by an overwhelming majority of voters. Nonetheless, the voluntary confession amendment raises no apparent state constitutional objections on procedural grounds.

B. Due Process Limitations on the Amendment Process

Under the Supremacy Clause of the United States Constitution,[76] any form of federal law, even federal agency regulations, takes precedence over any form of state law, including state constitutions. The most common federal limitations on state law, however, arise from the United States Constitution itself.[77] Thus, a state constitutional amendment that expressly denies a public education to members of a particular racial minority would undoubtedly violate the equal protection clause of the fourteenth amendment.[78] The state amendment, therefore, would lack all force and effect.

Although the voluntary confession amendment presents no equal protection problem, its adoption does raise questions under the fourteenth amendment's nebulous due process standards. One question involves the possibility that a large percentage of Pennsylvania voters failed to comprehend the meaning or purpose of the amendment.[79] Another involves the notion that defendants on trial in Pennsylvania courts have acquired a vested right to the procedural protections established in *Triplett*.

1. Voidness Due to Incomprehensibility.—Excessive length,

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74. *See, e.g.*, Hyder v. Edwards, 269 S.C. 138, 236 S.E.2d 561 (1977) (amendment of state constitution must strictly comply with constitutional provisions); Johnson v. Duke, 180 Md. 434, 24 A.2d 304 (1942) (judicial duty to uphold integrity of fundamental law by ensuring that changes conform with constitutional procedures); Ellingham v. Dye, 178 Ind. 336, 99 N.E. 1 (1912) (amendment process must comply with particular provisions of federal and state constitutions); *But cf.* State *ex rel.* Smith v. Kelly, 149 W. Va. 381, 141 S.E.2d 142 (1965) (substantial compliance with state constitutional amendment procedures is sufficient).

75. 433 Pa. 406, 250 A.2d 474 (1969), *appeal dismissed* 395 U.S. 827 (1970).

76. U.S. CONST. art. VI, cl. 2. *See supra* note 70.

77. *See* Fischer, *supra* note 10, at 59-72.

78. The United States Supreme Court has long held that, under the fourteenth amendment, a state cannot deny a person equal educational opportunities because of race. *See* Brown v. Board of Education, 347 U.S. 483 (1954).

79. *See supra* notes 50 & 51 and accompanying text.

vagueness or complexity in a proposed constitutional amendment may violate the tenets of due process.[80] According to a recent Florida Supreme Court decision, due process requires that amendment propositions "be fair and advise the voter sufficiently to enable him intelligently to cast his ballot."[81] A majority should not deprive a minority of important rights unless it fully understands the magnitude of its action.

As the Shippensburg State University voter study[82] indicates, the vast majority of Pennsylvania voters felt unable to respond intelligently on either of the two recent ballot questions. Perhaps this lack of understanding explains the low level of voter participation. The total votes cast on the voluntary confession amendment constituted less than fifty-four percent of the total votes cast for President of the United States and just over forty-two percent of the total registered voters in Pennsylvania.[83]

Any difficulty in comprehension arises more from the nature of the amendment than its particular language. For a layperson to grasp the meaning of the amendment, he would need at least some familiarity with such legal niceties as the circumstances under which a court suppresses evidence, the difference between impeachment evidence and evidence of guilt, and the privilege against self-incrimination. In the detached judicial atmosphere of the courtroom, a competent trial judge could make these concepts clear to a jury. But amidst the slogans, rhetoric and other distractions of a general election, particularly a Presidential election, the voter has little opportunity for investigation and mature reflection on constitutional principle.

Thus, an overly complex amendment also leads to the possibility that under-informed voters, if they choose to vote on the ballot propositions at all, will rely too heavily on misleading campaign propaganda.[84] Even in the relatively deliberative atmosphere of the Pennsylvania Senate chamber, supporters argued that the voluntary confession amendment would protect the citizens of Pennsylvania against those who, in the words of Senator Bell, "burglarize and then viciously attack and wound or kill the people in [their] houses."[85]

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80. Fischer, *supra* note 10, at 66. Professor Fischer discusses the due process ramifications of ballot issues proposed by popular initiative. Although the Pennsylvania Constitution does not provide for amendment by initiative, due process objections based on incomprehensibility apply equally to legislatively proposed amendment propositions.

81. Grose v. Firestone, 422 So. 2d 303, 305 (Fla. 1982).

82. *See supra* note 52 and accompanying text.

83. *See supra* note 51.

84. Fischer, *supra* note 10, at 66-67.

85. 1983 PA. SENATE LEGIS. J. 198 (remarks of Sen. Bell). Senator Greenleaf pleaded: "As every day goes by, there is the potentiality of additional defendants taking the stand and

On the other hand, a due process attack predicated on comprehensibility raises several difficulties. First, no practicable legal standard of comprehensibility now exists.[86] Experts have developed various readibility tests,[87] but no court has attempted to equate any one of them with due process. Even if a court did apply a particular test, it would have to determine what degree of readibility or level of comprehensibility satisfies due process, the most vague of constitutional norms. Second, a comprehensibility attack on a proposed amendment would require the court to adopt "a patronizing view of popular abilities."[88] Although many of the sacred "checks and balances" in the American governmental structure evolved from a profound distrust of popular rule, American political theory still proceeds on the assumption that all power, including the judicial power, ultimately emanates from the people.[89] Third, a successful comprehensibility challenge might undermine the basic legal fiction that the people understand the laws which define legitimate conduct.[90] Ultimately, despite the extreme complexity of the voluntary confession amendment, this kind of due process objection would probably fail.

2. Vested Rights Theory.—Another possible due process challenge arises from the "vested rights" theory. This theory provides that once the state judiciary recognizes a certain level of protection under the state bill of rights, a person acquires a constitutional right to receive the same level of protection.[91] The vested rights approach, however, imposes a doctrinal strait jacket on the states.[92] It assumes that once the judiciary recognizes a right, the right becomes forever

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walking out of the courtroom even though they are guilty." *Id.* at 197.

86. Fischer, *supra* note 10, at 67. "How is comprehensibility to be measured? Does due process require that ballot propositions be drafted so they can be understood by the average person with a sixth grade education? Should a person with a high school diploma be the standard?" *Id.*

87. For example, the Flesch Reading Ease Formula purports to measure readability through reference to sentence length and average number of syllables per word. *See* R. FLESCH, HOW TO WRITE PLAIN ENGLISH (1979); *see also* Ross, *On Legalities and Linguistics: Plain Language Legislation*, 30 BUFFALO L. REV. 329-39 (1981) (discussing readability standards, including the Flesch standards, used in plain language laws).

88. Fischer, *supra* note 11, at 68.

89. "Under the Constitution of the Commonwealth of Pennsylvania '[a]ll power is inherent in the people,' . . . and no person nor branch of government has any more power than is provided by that absolute framework of government." Shapp v. Butera, 22 Pa. Commw. 229, 233, 348 A.2d 910, 912 (1975) (quoting PA. CONST. art. I, § 2). Most state constitutions expressly acknowledge "the people" as the ultimate authority. *See, e.g.*, MD. CONST. art. I ("all Government of right originates from the People"); N.J. CONST. art. I, § 1 ("all political power is inherent in the people"); MASS. CONST. pt. 1, art. IV ("the people . . . have the sole and exclusive right of governing themselves").

90. Anglo-American law is replete with legal aphorisms to this effect: *ignorare legis est lata culpa*, that is "to be ignorant of the law is gross neglect"; *ignorantia juris quod quisque tenetur seire, neminem excusat*, that is, "ignorance of the law, which everyone is bound to know, excuses no man." BLACK'S LAW DICTIONARY 673 (5th ed. 1979).

91. Fischer, *supra* note 11, at 69.

92. *Id.* at 72.

immune from legislative or popular reconsideration. Furthermore, because the theory relies on the federal Due Process Clause, "it would distort federal-state relations by giving the federal courts ultimate control over revisions of state law any time a person arguably affected by that revision claimed a vested right."[93] Thus, a court would not willingly declare a state constitutional amendment void merely because the amendment frustrates a defendant's expectation of constitutional protection.

In short, the voluntary confession amendment does not appear to violate any provisions or theories of state or federal law. The absence of legal constraints, however, should not end the inquiry.

VI. Political Theories on the Propriety of the Voluntary Confession Amendment

A. The Majoritarian Nature of State Constitutions

Differences between the federal and state constitutions in length and specificity follow from the comparative ease with which, in every state but one, a simple majority of the electorate can amend the state charter.[94] Amendment of the United States Constitution requires approval by both houses of Congress and then by representative bodies in three-fourths of the states.[95] This decidedly antimajoritarian process has produced only twenty-six amendments in nearly 200 years. Conversely, alteration of state constitutions is a less arduous task, usually beginning by one of three methods: legislative proposal, provided for in every state charter; constitutional initiative, provided for in seventeen charters; and constitutional convention, provided for in forty-one charters, but permitted in every state.[96] Under every amendment scheme but Delaware's, the ultimate determination rests with the voters, who by a bare majority, can approve the proposed changes.[97] These permissive procedures

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93. *Id.*

94. BOOK OF THE STATES, *supra* note 1, at 223-25. The constitutions of Delaware and New Hampshire present the most antimajoritarian amendment schemes. In Delaware, proposed amendments must receive the approval of two-thirds of two consecutive legislatures. The electorate does not participate. DEL. CONST. XVI, § 1. In New Hampshire, proposed amendments must receive the approval of two-thirds of the electorate. N.H. CONST. pt. 2, art. 100. However, state constitutions in many aspects resemble statutory law more than they resemble the lofty, immutable generalities of the federal constitution. "Both their susceptibility to revision in response to popular opinion and the wealth of content they characteristically encompass encourage a view of state constitutions as integral parts of the democratic state governmental processes, not as external constraints upon them." *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1353 (1982) [hereinafter cited as *Developments*].

95. U.S. CONST. art. V.

96. BOOK OF THE STATES, *supra* note 1, at 211.

97. *See Developments*, *supra* note 94, at 1354.

have fueled what one observer has termed as "amendomania."[98] As a result, current state constitutions have undergone over 5000 alterations collectively.[99] Not surprisingly, these documents in many aspects reflect the will of the majority.

B. Special Status of State Bills of Rights Within State Constitutions

Despite the furious pace of "amendomania," state bills of rights have undergone comparatively little revision.[100] Although voters occasionally have tinkered with individual rights to reverse unpopular court rulings, a good number of the changes in this area have expanded rather than narrowed constitutional protections.[101] Many states, including Pennsylvania, have adopted amendments prohibiting gender discrimination and guaranteeing a clean environment.[102] Others have provided for the rights of handicapped persons, the right to work or to bargain collectively, and the right to an education.[103]

In both theory and practice, there is a difference between the "general, great and essential principles of liberty" set forth in the state bills of rights, and the more legislative-like provisions regulating such prosaic matters as taxation and municipal debt management. Bills of rights exist, in essence, to protect all people, but particularly to protect the members of vulnerable minorities from frequent and violent fluctuations of the majority will.[104] They are the fundamental law, and fundamental law, as one court noted long ago, is not open to change "except in such particular and deliberate ways as to render as certain as practicable that the electors desired it, evidenced by an expression of judgment after ample time and facility

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98. Comment, *California's Constitutional Amendomania*, 1 STAN. L. REV. 279 (1949) (noting that between 1876 and 1946, a total of 439 amendments to the California Constitution were proposed, of which 246 were ratified).

99. BOOK OF THE STATES, *supra* note 1, at 221.

100. *See Developments*, *supra* note 94, at 1354. Between 1980 and 1983, a total of 125 state constitutional amendments relating to finance and taxation were proposed. Of these, 80 were adopted. A total of 75 changes affecting legislative functions were proposed, of which 39 were adopted. Conversely, in the same period, only 26 amendments to the state Bill of Rights were proposed, and 23 were adopted. BOOK OF THE STATES, *supra* note 1, at 216.

101. Generally, the expansion of constitutional protection has involved the recognition of new rights rather than the modification of old ones. *See, e.g.*, ALASKA CONST. art. I, § 22 (right of privacy).

102. *See, e.g.*, PA. CONST. art. I, § 28 (gender); *id.* art. I, § 27 (clean environment); ILL. CONST. art. I, § 18 (gender); CALIF. CONST. art. I, § 8 (same).

103. For a discussion of recent developments, see BOOK OF THE STATES, *supra* note 1, at 214-16.

104. *See generally* W. O. DOUGLAS, THE RIGHT OF THE PEOPLE (reprint ed. 1980) ("even the humblest of citizens has the same dignity before the law as the most powerful" because "man is a child of God entitled to dignified treatment"); R. DWORKIN, TAKING RIGHTS SERIOUSLY 131-49 (1977) (American government predicated on theory that "men have moral rights against the state"); 16 AM. JUR. 2D *Constitutional Law* § 4 (1979) (citing cases).

for investigation and maturity of thought on the subject."[105] In other words, an amendment to the state charter should reflect "the sober second thought"[106] of the people.

Though the legislature followed the technical procedures in proposing the voluntary confession amendment and the amendment received the imprimatur of an electoral majority, the alteration of long-established fundamental rights, so critical to the protection of minority elements, deserved stricter scrutiny. Under article XI of the Pennsylvania Constitution, the sole responsibility for initiation of the amendment process lies with the general assembly, unless the people, under some extraordinary circumstance, invoke their sovereign power to call a convention.[107] But the Pennsylvania General Assembly and all state legislatures have the duty to uphold the spirit, as well as the letter, of the constitutional structure.[108] Viewed in this light, the general assembly appears to have acted improperly.

C. The Province of the Judiciary: The Theory of Separation of Powers

The voluntary confession amendment encroaches upon the state judiciary. As Chief Justice Marshall declared early on in *Marbury v. Madison*,[109] "it is emphatically the province and duty of the judicial department to say what the law is."[110] Since *Marbury*, the idea that the courts serve as ultimate interpreter of the constitution has for the most part become ingrained in both state and federal constitutional law.[111] This assignment does not mean that the people cannot alter their fundamental laws to reflect a viewpoint other than that of the state judiciary. The courts, however, more than the people or the legislatures, can best administer the specific application of general constitutional norms. The very nature and structure of the judicial branch make it the most appropriate interpreter of fundamental, antimajoritarian liberties.

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105. State *ex rel.* Mueller v. Thompson, 149 Wis. 488, 491, 137 N.W.2d 20, 22 (1912).

106. Ellingham v. Dye, 178 Ind. 336, 99 N.E. 1, 15 (1912).

107. Although the Pennsylvania Constitution does not expressly provide for amendment by constitutional convention, the Supreme Court of Pennsylvania has long recognized the legitimacy of conventions called by the people. *See* Taylor v. King, 284 Pa. 235, 130 A. 407 (1925); Wells v. Bain, 75 Pa. 39 (1874).

108. This duty is at least implied in the oath of office to which every Pennsylvania legislator, judge and state or county officer must subscribe: "I do solemnly swear (or affirm) that I will *support*, obey and *defend* the Constitution of the United States and the Constitution of this Commonwealth and that I will discharge the duties of my office with fidelity." PA. CONST. art. VI, § 3 (emphasis added).

109. 5 U.S. (1 Cranch) 137 (1803).

110. *Id.* at 177.

111. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 703 (1974) (quoting *Marbury*); Zemprelli v. Daniels, 496 Pa. 247, 436 A.2d 1165 (1981) (decision as to whether claim presents a nonjusticiable political question is responsibility of state supreme court, the "ultimate interpreter of the Constitution").

1. Courts as Legal Specialists.—Basically, courts are bodies of legal experts. Most appellate level judges have had formal legal training.[112] Moreover, the judicial atmosphere of the courtroom usually lends itself to thoughtful application of that training. Judges must hear all sides of an argument, and in most cases they must justify their decisions through some form of written opinion that sets out the factual, legal and public policy ramifications of the controversy. On the whole, the judicial mind tends to apply the law and legal reasoning, rather than majoritarian politics, particularly in its analysis of constitutional rights.[113] For this reason, one commentator has characterized the United States Supreme Court as a "teacher in an eternal national constitutional seminar."[114]

2. Impartiality.—Since the seventeenth century, when Sir Francis Bacon lost his position as lord chancellor of England for receiving gifts from litigants,[115] impartiality has become the hallmark of the judicial branch of government.[116] Impartiality remains the single quality that most clearly distinguishes a judicial proceeding from a legislative or administrative proceeding.[117] A legislator can bring into a legislative debate all the biases and prejudiced his constituents will tolerate without tainting the lawmaking process in the least. In fact, the framers of the American system of government intended the legislative branch to accommodate the self-interested rivalries that would inevitably arise in a pluralistic society.[118] But the judiciary operates under different conditions. For example, the procedural aspects of due process mandate open, two-sided hearings with a verbatim transcript of the proceedings in most cases.[119] Additionally,

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112. Every judge on the Pennsylvania Supreme, Superior and Commonwealth Courts has a law degree. *See* DEPT. OF GEN. SERV., COMMW. OF PA., 1982-83 PA. MANUAL 418-24 (1983).

113. Of course, political influences *do* exist. *See* Nagel, *Political Party Affiliation and Judge's Decisions*, in COMPARATIVE STATE POLITICS: A READER 392 (1971) (postulating that party affiliation affects a judge's decisions).

114. H. ABRAHAM, THE JUDICIARY: THE SUPREME COURT IN THE GOVERNMENTAL PROCESS 189 (4th ed. 1977).

115. R. NEELY, HOW COURTS GOVERN AMERICA 190 (1981).

116. *Id.* The author notes:

> In elected politics, the legislature and the executive take idealistic, energetic, and ambitious young men and turn them into whores in five years; the judiciary takes good, old, tired, experienced whores and turns them into virgins in five years . . . . The decisive factor is the institution—whether the exact same creatures are quartered in the local house of ill fame or in the Temple of the Vestal Virgins.

Id.

117. *See, e.g.*, Mulhearn v. Federal Shipbuilding & Dry Dock Co., 2 N.J. 356, 66 A.2d 726 (1949) (distinguishing adjudicatory administrative proceedings from court proceedings: impartiality a fundamental characteristic of a judge).

118. *See, e.g.*, THE FEDERALIST NO. 51 (J. Madison) 335-41 (Bicentennial ed. 1976) (theories of bicameralism and separation of powers explained).

119. *See* R. NEELY, *supra* note 115, at 192-93; *see also* Goldberg v. Kelly, 397 U.S. 254 (1970) (laying out the requirements of procedural due process).

ethical codes pervading both bench and bar forbid even elected judges from "politicking" or speaking out on controversial issues.[120] In these detached and neutral tribunals members of "discrete and insular minorities" can most readily obtain fair consideration of fundamental rights.

3. Separation of Powers.—The idea that the United States is a democracy which champions democratic ideals pervades the popular political conscience,[121] but pure democracy—in the sense of direct government by the governed—does not and cannot exist in the United States at any level of government.[122] The founders of the American political system feared the tyranny of an unfettered majority almost as much as the tyranny of an absolute monarch.[123] They established a multi-tiered system of representative government, the diversity and size of which would frustrate the concentration of power in any one person or group.[124] As a further check on tyrannical influences, they divided each of the two main levels of government, national and state, into three coequal branches. Of the three, the judicial branch performs the role most vulnerable to criticism:[125] custodian, conservator, and interpreter of fundamental principles against the often short-sighted majoritarian process.

Thus, in the American political scheme, the majority cannot, or at least should not, arrogate to itself the authority to determine the scope of individual rights. Ronald Dworkin and other modern political philosophers have refuted the argument that legislatures and other democratic institutions possess some "special title" to make constitutional decision:

> One might say that the nature of this title is obvious, because it is always fairer to allow a majority to decide any issue than a

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120. *See* R. NEELY, *supra* note 115, at 194.

121. This idea is epitomized in Woodrow Wilson's declaration, on the eve of America's entrance into World War I, that the world "must be made safe for democracy." J. BARTLETT, FAMILIAR QUOTATIONS 682 (E. Beck 15th ed. 1980). Similarly, Franklin Roosevelt urged, on the eve of World War II, that America "must be the great arsenal of democracy." *Id.* at 780.

122. U.S. CONST. art. IV, § 4 guarantees "to every State in this Union a Republican Form of Government." The United States Supreme Court has held that the determination of whether a state government is republican in form is a political question for Congress, not the courts, to decide. Luther v. Borden, 48 U.S. (7 How.) 1 (1841); Pacific States Telephone & Telegraph v. Oregon, 223 U.S. 118 (1912).

123. *See supra* notes 54-56 and accompanying text.

124. *See, e.g.*, THE FEDERALIST NOS. 10, 46, 47, 48, 51 (J. Madison) (describing in detail the structure and theory of American government under the United States Constitution).

125. Alexander Hamilton described the judiciary as the weakest branch of government:

> The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither *force nor will*, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

THE FEDERALIST NO. 78, at 504 (A. Hamilton) (Bicentennial ed. 1976) (emphasis in original).

> minority. But that, as has often been pointed out, ignores the fact that decisions about rights against the majority are not issues that in fairness ought to be left to the majority. Constitutionalism—the theory that the majority must be restrained to protect individual rights—may be a good or bad political theory, but the United States has adopted that theory, and to make the majority judge in its own cause seems inconsistent and unjust. So principles of fairness seem to speak against, not for, the argument from democracy.[126]

These constitutional principles are not exclusively applicable on a national level. When applied in the context of the voluntary confession amendment, they suggest that the General Assembly's adoption of the proposal invaded the province of the state judiciary.

4. Political Accountability of State Judges.—Some commentators have noted that state judges are less independent than their life-tenured federal counterparts.[127] Most state judges must account for themselves by some political process.[128] Pennsylvania judges, for example, hold their positions by popular election.[129] Thus, these commentators believe that the state judiciary is as much a majoritarian instrument as the legislature and is no better qualified than any other political body to determine individual rights.

Yet, this argument ignores the essential constitutional role of the judiciary as a body of dispassionate, impartial legal experts occupying an independent and coequal branch of government. In this system, the use of the amendment process to overrule the state supreme court every time a specific application of the law offends the will of the majority is even less justified[130] because political accountability eliminates the need to make minute alterations in a state bill of rights. Moreover, if the decisions of the state judiciary truly offend the collective sense of fairness and justice, the judges responsible for those decisions will likely face defeat in the next election.

D. Preeminence of State-Guaranteed Fundamental Rights

In support of the voluntary confession amendment, Senator Greenleaf relied heavily on the United States Supreme Court's con-

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126. DWORKIN, *supra* note 104, at 142.

127. *See Developments*, *supra* note 96, at 1351. Only three states approximate the federal model of judicial independence. Massachusetts, Rhode Island and New Hampshire provide for life tenure and appointive selection. *Id.*

128. BOOK OF THE STATES, *supra* note 1, at 154-55.

129. PA. CONST. art. V, § 13. Justices and judges serve for terms of 10 years. They can then run for subsequent terms in a nonpartisan retention election. *Id.* at § 15.

130. Several opponents of the amendment in the Pennsylvania Senate argued that legislatures should not overrule judges everytime they disagree on specific holdings. See *supra* notes 46 to 50 and accompanying text.

struction of the fifth amendment in *Harris v. New York*.[131] The Senator correctly argued that the proposed amendment would bring Pennsylvania in line with the *Harris* decision,[132] but he did not consider that the privilege against self-incrimination under article I, section 9, of the Pennsylvania Constitution stands independent of the privilege under the fifth amendment to the federal constitution. State rights neither derive from nor depend upon the existence of federal rights. Rather, they are founded on a set of common values underlying the American system of government. Accordingly, careful preservation of these fundamental rights is as important at the state level as it is at the federal level.

1. The Foundations of State Guarantees.—Both state and federal constitutional rights evolved from a body of organic law hundreds of years older than the Republic.[133] In fact, the colonial charters of William Penn, founder and first governor of Pennsylvania, contained many of the procedural guarantees found in the modern bills of rights.[134] Pennsylvania's first independent constitution expressly recognized the privilege against self-incrimination, more than fifteen years before the adoption of the fifth amendment.[135]

Certainly, the framers of the federal constitution and the federal Bill of Rights understood the sovereignty of state-guaranteed fundamental rights. Alexander Hamilton, among others, argued that the existence of state protections made a federal Bill of Rights unnecessary.[136] When critics objected to the proposed federal constitution on the ground that it lacked an enumeration of individual rights,[137] Hamilton observed that "a minute detail of particular rights is certainly far less applicable to a constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a [state] constitution which has

131. *See* 1981 PA. SENATE LEGIS. J. 790 (remarks of Sen. Greenleaf on the *Harris* decision); 1983 PA. SENATE LEGIS. J. 196-97 (same).

132. 1981 PA. SENATE LEGIS. J. 790 (remarks of Sen. Greenleaf).

133. Modern bills of rights have some antecedents in the Magna Carta itself, which the barons of England exacted from King John in 1215. *See generally* A. HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA (1968). Bernard Schwartz has called the Magna Carta "the germ of the root principle that there are fundamental rights above the State, which the State—otherwise sovereign power that it is—may not infringe." 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 4 (1971).

134. *See* PA. FRAME OF GOV'T §§ V, VI, VIII, XI (1682) (guaranteeing right to public trial, to plead through representatives, to a jury trial and to bail); PA. CHARTER OF PRIVILEGES §§ IV, V (1701) (guaranteeing a right similar to due process and right to call witnesses).

135. *See* PA. CONST. OF 1776 art. IX.

136. *See* THE FEDERALIST NO. 84, at 555-61 (A. Hamilton) (Bicentennial ed. 1976).

137. Thomas Jefferson was perhaps the most influential proponent of a bill of rights. In a letter to James Madison on February 6, 1788, he observed that the absence of a bill of rights in the proposed federal constitution was the proposal's "principal defect." 12 THE PAPERS OF THOMAS JEFFERSON 569 (J. Boyd ed. 1955).

the regulation of every species of personal and private concerns."[138] Members of the First Congress, including James Madison, worried that an enumeration of federal rights might disparage those rights which the people retained under state constitutions.[139] They therefore proposed what would become the ninth amendment to ensure, in effect, that the state bills of rights would maintain their exalted status.[140]

2. The Renaissance of State Bills of Rights.—During the 1950s and '60s, the Warren Court's expansive view of individual rights, particularly the rights of racial minorities[141] and of the accused,[142] inspired the swift rise of the federal Bill of Rights to paramount importance in American constitutional law. As a result, state judges often rely exclusively on federal precedent to resolve constitutional disputes arising in their courts.[143] Recent changes in the Supreme Court's decision on individual rights, however, have sparked a renaissance of state constitutional jurisprudence.[144] States have rediscovered the idea that their organic law can provide fundamental protections against majoritarian abuse that rival or exceed those afforded by the federal government.[145]

3. The Need for Independent State Analysis.—Many commentators,[146] including two Justices of the United States Supreme Court,[147] argue that the American constitutional system renders independent state analysis not only proper, but necessary. Concurring in *Massachusetts v. Upton*,[148] Justice Stevens maintained that a state court's failure to construe its own state constitutional guarantees contravenes the ninth amendment, even though the state court relies on equivalent guarantees in the federal constitution. In *Upton*, the Massachusetts Supreme Judicial Court had relied predominantly

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138. THE FEDERALIST NO. 84, at 559 (A. Hamilton) (Bicentennial ed. 1976).

139. *See* B. SCHWARTZ, *supra* note 133, at 1031.

140. *Id.* at 1027.

141. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954) (racial segregation); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (voting rights); Loving v. Virginia, 388 U.S. 1 (1967) (anti-miscegenation statutes); *see generally* B. BOZELL, THE WARREN REVOLUTION (1966) (critical analysis of judicial policy-making).

142. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967) (search and seizure); Miranda v. Arizona, 386 U.S. 436 (1966) (self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); *see generally* THE CRIMINAL LAW REVOLUTION AND ITS AFTERMATH: 1960-1974 (BNA 1975) (citing cases).

143. Brennan, *supra* note 22, at 490-91.

144. *See supra* notes 21-23 and accompanying text.

145. *See supra* note 22.

146. *See, e.g.*, Force, *supra* note 23 (state courts better able to protect individual rights); Douglas, *supra* note 23 (state judge urges other state judges to apply state constitutional law before applying federal constitutional law).

147. Justices Brennan and Stevens.

148. 104 S. Ct. 2085 (1984).

on federal precedent and the fourth amendment guarantee against unreasonable search and seizure to overturn a criminal conviction.[149] The United States Supreme Court reversed and, in a *per curiam* decision, held that the Massachusetts court had misapplied federal precedent. Justice Stevens found error not in the analysis of federal law, but in the failure to apply state law. He noted that the Massachusetts opinion nowhere indicated whether the search warrant in question violated the Massachusetts search and seizure provision.[150] Thus, the state court, in violation of the ninth amendment, had disparaged the rights retained by the people of Massachusetts under the state constitution.[151] According to Stevens, state judges must first consider the state guarantee, and need only consider the federal guarantee when the state affords no protection.[152]

The idea that the states may actually play a more important role than the federal government in defining the scope and meaning of fundamental rights receives support from the very structure of the federal system. Charged with establishing fundamental law suitable for nationwide application, the United States Supreme Court analyzes the federal Bill of Rights conservatively, focusing on minimal guarantees for the most part.[153] Thus, the Court has shown some sensitivity to the size and diversity of its jurisdiction[154] and to the preservation of state integrity in the federal system.[155]

Conversely, the more homogenous jurisdiction and somewhat lighter caseload of the state court permits a closer and more meaningful analysis of basic rights. The Pennsylvania courts, for example, can better apply on a case-by-case basis, the ancient principles of the state's organic law as they have evolved from the original Penn charters. State courts can experiment with specific applications of constitutional principles without the concern for long-term bad effects that would affect the entire nation.[156] Moreover, state judges rarely enjoy

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149. In its interpretation of the probable cause requirement of the fourth amendment, the Massachusetts Court relied upon the approach set forth in Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969). In Illinois v. Gates, 103 S. Ct. 2317 (1983), however, the Court rejected this approach.

150. MASS. CONST. art. 14.

151. *See, e.g.*, Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984) (written by Justice Linde of the Supreme Court of Oregon).

152. Justice Stevens concluded:

> It must be remembered that for the first century of this nation's history, the Bill of Rights of the Constitution of the United States was solely a protection for the individual in relation to federal authorities. State constitutions protected the liberties of the people of the several States from abuse by state authorities.

Upton, 104 S. Ct. at 2091 (Stevens, J., concurring).

153. *Developments*, *supra* note 94, at 1348-49.

154. *See* Argersinger v. Hamlin, 407 U.S. 25, 27 n.1, 37 n.7 (1972); Mapp v. Ohio, 367 U.S. 643, 650-53 (1961).

155. *See* National League of Cities v. Usery, 426 U.S. 833 (1976); San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 41-44 (1973).

156. *Developments*, *supra* note 94, at 1397-98.

life tenure, permitting more frequent infusion of new blood into the state judiciary. Thus, in addition to a greater knowledge of state law, history, and tradition, state courts possess greater flexibility than federal courts in the application of specific principles of constitutional law.

E. Constitutional Characteristics: Generality and Permanency

As the Pennsylvania Supreme Court noted over a century ago, "a constitution is made, not particularly for the inspection of lawyers, but for the inspection of the million, that they may read and discern in it their rights and their duties; and it is consequently expressed in the terms that are most familiar to them."[157] Codes and statutes contain the kind of legalistic detail necessary to meet the specific conditions of everyday life.[158] Constitutions, on the other hand, embody more permanent and general precepts.[159] They provide an element of stability against the impulses of bare majorities and enunciate the general principles to which every person can turn for guidance when new situations arise.[160]

In some areas, of course, state constitutions do not conform to the model. Constitutional language concerning taxation, state and local finance, administrative agencies, electoral apportionment, and local government resembles statutory language in its attention to detail.[161] In these matters, for better or worse, state constitutions require constant tinkering. Nonetheless, in Pennsylvania, as elsewhere, the Declaration of Rights has always embodied "general, great and essential principles of liberty and free government." This generality ensures the flexibility necessary to meet ever-changing conditions[162] and preserves the Declaration of Rights as an enduring and respected guideline.

The voluntary confession amendment, however, represents an attempt to fine-tune the language of the privilege against self-incrimination. By littering the "great principles" with technical exceptions, such amendments will diminish both the status and the purpose of state-guaranteed rights. Furthermore, if the amendment merely reflects a swing to the political right in Pennsylvania, then individual rights would appear to depend upon fad and fashion rather than ba-

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157. Commonwealth *ex rel.* Schnader v. Beamish, 309 Pa. 510, 514, 164 A. 615, 616 (1933) (quoting Monongahela Navigation Co. v. Coons, 6 Watts & Serg. 101, 114 (1843)).

158. *See generally* 16 AM. JUR. 2D *Constitutional Law* § 3 (1979).

159. *Id.* §§ 4,5.

160. *Id.* § 4.

161. State constitutional language sometimes indulges in absurd amounts of detail. *See, e.g.*, OR. CONST. art. IX, § 8 (regulating the purchase of stationery used in state offices); ARIZ. CONST. art. XXVI, § 1 (enumerating the kinds of documents real estate brokers can sign).

162. *See* Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928 (1968); 16 AM. JUR. 2D *Constitutional Law* § 7 (1979).

sic principles of justice. When the popular mood changes, as it inevitably will, and the political pendulum swings in the opposite direction, the general assembly might again rewrite the fundamental law. In the long run, the people and the courts will cease to rely on the Declaration of Rights, and Pennsylvania constitutional jurisprudence will again become subservient to the United States Supreme Court.

VII. Conclusion

Although the General Assembly breached no legal duty, it ultimately appears to have abused political discretion granted to it by the amendment provision of the state charter. Alexander Hamilton once described the constitutional amendment process as a "solemn and authoritative act."[163] At the very least, it requires more farsightedness and concern for political minorities than legislators usually display in the ordinary course of their majority-bound business.[164]

Certainly the integrity of our political system depends upon the preservation of certain basic rights, such as the privilege against self-incrimination, to guard against the whims of popular passion. Legislators, then, must exercise their critical role in the amendment process with respect for the long-term purposes of constitutional government. They must put aside political considerations that often motivate their decision-making and concentrate on the interrelationships between "the people," the courts, and the constitution. Electoral ratification of a proposed amendment does not remedy a political indiscretion on the part of the legislature, because the fundamental rights involved, and the fundamental nature of the document itself, transcend majoritarian politics. Even if electoral approval usually legitimatizes otherwise errant acts, ratification of the voluntary confession amendment clearly lacked the full and meaningful participation of Pennsylvania voters.[165] In any event, an ill-considered, politically-motivated adherence to the will of the majority will tip the constitutional balance in favor of tyranny.

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163. THE FEDERALIST No. 78, at 509 (A. Hamilton) (Bicentennial ed. 1976).

164. This is not to say that in the ordinary course of legislative business, legislators should ignore the will of the majority. Actually, the legislatures exist in the American scheme of government to reflect that will.

165. *See supra* notes 51-52 and accompanying text.